

82-1563

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No.

IN THE

ALEXANDER L. STEVAS,
CLERK

Supreme Court of the United States

October Term, 1982

EDWARD G. HALLEY,

Petitioner,

-against-

CONSOLIDATED RAIL CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Is the "Liepelt doctrine"*,
(jury awards for future lost earnings
must be based on plaintiff's net in-
come), which is presently extended to
all federal law claims for future
lost wages, properly applied as well
to claims for past lost wages in
actions arising under the Federal
Employers' Liability Act, 45 U.S.C.
§ 51 et seq.?

* Norfolk & Western Railway Co. v. Liepelt,
444 U.S. 490, 100 S. Ct., 755, 62 L.Ed.2d
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No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

EDWARD G. HALLEY,

Petitioner

-against-

CONSOLIDATED RAIL CORPORATION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

To the Justices of the Supreme Court of the United States:

Petitioner Edward G. Halley respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit denying his appeal of the remittitur ordered by the United States District Court for the Southern District of New York.

OPINIONS BELOW

The opinions of the Court of Appeals are not reported and are set forth in Appendix A, infra at A-1, et seq. The opinion of the District Court is not reported and is set forth in Appendix D, infra at A-__ et seq.

PARTIES

The plaintiff in the courts below was Edward G. Halley, a freight train conductor.

Defendant was Consolidated Rail Corporation (Conrail), his employer.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C.

§1254 which states in pertinent part-
"Cases in the courts of appeals may be reviewed by the Supreme Court***

(1) By writ of certiorari granted upon the petition of any party to any civil *** case, before or after rendition of judgment or decree".

STATEMENT OF THE CASE

This was an action brought under the Federal Employers' Liability Act (FELA), 45 U.S.C. 51, et seq., as the result of a train wreck on January 5, 1979, following which plaintiff was out of work until April 19, 1979.

Recovery was sought for past and future loss of income and past and future pain and suffering. Liability was conceded,

and the case was tried to the issue of damages only.

The jury returned a unanimous verdict in plaintiff's favor in the sum of \$10,000 for past lost wages; \$100,000 for future lost wages; \$50,000 for past pain and suffering; and \$25,000 for permanent pain and suffering.

Following defendant's motion to set aside the verdict and for a new trial, the trial judge ordered that the jury's awards for past and future loss of earnings be reduced by 25% to account for taxes that plaintiff would have paid and based this reduction on this Court's decision in Liepelt, supra. The trial judge further ordered that the award for pain and suffering subsequent to April 19, 1979 be reduced from \$25,000 to \$500 and that plain-

tiff either accept this remittitur or submit to a new trial.

Plaintiff appealed the trial judge's reduction of the verdict, and defendant cross-appealed on the grounds that the verdict, even as reduced by the Order, was excessive.

The United States Court of Appeals for the Second Circuit ruled the appeal premature and, without deciding its merits, mandated that plaintiff pursue the case to final judgment and submit to a second trial before appealing the remittitur ordered after the first trial.

A second trial was held on April 14, 1982; final judgment was entered on April 21, 1982; and plaintiff appealed again. The Second Circuit affirmed the District Court's reduction by 25% of the jury's awards for past and future lost earnings to arrive at an approximate equivalent of net income. Plaintiff's

petition for a rehearing en banc was denied on December 21, 1982.

REASONS FOR GRANTING THE WRIT

I.

LIEPELT AND ITS PROGENY HAVE ESTABLISHED THAT AWARDS FOR FUTURE LOST EARNINGS MUST BE BASED ON PLAINTIFF'S NET INCOME BUT HAVE NEVER APPLIED THIS RULE TO AWARDS FOR PAST LOST EARNINGS

In the Liepelt case of 1980, this Court ruled it error to exclude evidence of plaintiff's tax profile and circumstances in an FELA wrongful death action but did not entertain the question of past lost earnings. Since that decision, Federal Circuit Courts of Appeals nationwide have been faced with the problem of interpreting Liepelt and applying its directives to computation of damages and jury instruction.

By now, a sizable body of case law has developed and clearly establishes that the precepts of Liepelt must be

applied to all federal law claims for future lost wages. This Court has placed its imprimatur on these holdings with its decision in Gulf Offshore v. Mobil Oil, 453 U.S. 473 (1981), which definitively rules that awards for future lost earnings must be based on plaintiff's net income.

A large, unresolved question remains, however, with regard to the determination of awards for past lost earnings, which comprise a portion of almost every FELA action, as they do in the instant case, yet have been addressed neither by this Court in Liepelt or Gulf Offshore nor by the Circuits in the cases citing and interpreting Liepelt.

In the instant case, the District Court's enlargement of the scope of the principles set forth in Liepelt to include and authorize blanket reduction of the jury's awards for both future and

past lost earnings raises an important consideration germane to the determination of similar damage awards to railroaders in every district and circuit in the country.

A rule of law enunciated and clarified for the sole purpose of determining damage awards for future lost earnings based on net income ought not to be perforce extended automatically to awards for past lost earnings as well. It is abundantly clear that the two losses and their concomitant circumstances and ramifications are not synonymous and should be distinguished.

II.

APPLICATION OF THE TENETS OF
LIEPALT TO AWARDS FOR PAST LOST
EARNINGS DELETERIOUSLY AFFECTS
RAILROADERS THROUGHOUT THE NATION
AND AUTHORIZES UNJUST WINDFALLS FOR
TORTFEASOR RAILROAD COMPANIES

Extension of the Liepelt precepts to awards for past lost earnings has already had a pernicious effect on the railroad industry and unless checked by judicial clarification will continue to wreak economic havoc on railroaders throughout the nation.

The majority of railroad workers are not paid during the time they are out of work because of injury, and almost every FELA claim includes a portion for past lost earnings. In fact, it is common practice for company claims departments to use a multiple of total past lost earnings as a basis for evaluating a claim, whether for serious or relatively minor injury.

Due to what has now been hailed throughout the industry as "the net income rule", railroad claim departments automatically reduce total past lost earnings to net income in all preliminary settlement negotiations with injured workers, making settlement of claims less likely and obliging the injured employee to seek redress in the courts and prolong still further the restoration of past lost wages.

Plaintiff herein was out of work for only four months after the accident. If the District Court's reduction to net income of the award for past lost earnings is allowed to stand, it will have even more chilling effects upon those injured railroaders compelled to remain out of work for much longer periods of time.

Extended lack of income consumes

the savings and undermines the general financial status of railroad workers and their families. Mortgage, car and household payments falter and stop; within a short period of time many are compelled to borrow from family and friends; from banks and finance companies; and not infrequently forced to seek welfare or other State aid. Interest, late charges and fines, which would not have been assessed under normal circumstances, accrue as further accident-related expense. Clearly, an award of "net income" does not make a plaintiff whole, and net income received as the result of a lawsuit two, three or more years after the actual wage loss does not restore him to his pre-accident economic position.

Conversely, the railroad receives a windfall from this very situation. Under the Railroad Retirement Act, 45 U.S.C. §231 et seq., provision is made for social security and pension, and payments by the company are allocated according to the number of months in which an employee works and receives salary. When an injured employee does not work and is not paid, he receives no credit towards his social security or pension funds. The railroad accordingly makes no payments into these funds nor does it pay withholding taxes. Rather, the railroad retains these monies as its own, to invest, re-invest, earn interest. Then, when it is necessary to pay the worker damages for his past lost earnings, the railroad claims the "net income rule" and deducts a percentage of his wages with-

out ever having had to make the concomitant social security, pension and withholding payments.

Unless clarification of the "Liepelt doctrine" with respect to past lost earnings is forthcoming, railroad workers will suffer still other insidious consequences that compound the purely monetary inequities already mentioned.

Retirement schedules are based on specified spans of "creditable service". An injury with prolonged recuperative requirements tolls his "creditable service" time and can add years to his normal retirement schedule.

Moreover, an employee's total tax picture includes the pension payments made by the company, and if in fact he is entitled only to net wage

loss as an award for past lost earnings, he should also be entitled to credit for the tax deduction that was never actually made but withheld by the railroad. If the courts do in fact hold that an injured railroad worker who recovers for past lost earnings should pay a tax on these monies, Congressional legislation or an IRS rule change will be needed to channel these funds away from the railroad and toward the benefit of the taxpayer and the government.

The rule of the instant case is a perversion of the "Liepelt doctrine" which permits the tortfeasor to profit from his tortious conduct and promotes a glaring inequity, contrary to the basic principles of tort law. The consequences that will flow from it with expanding

effect, if it is allowed to stand,
surely merit consideration..

There are compelling reasons
to enunciate a rule with respect to
past lost earnings that removes them
from the aegis of Liepelt and effects
an equitable and just resolution.

CONCLUSION

For the foregoing reasons, this
petition for a writ of certiorari should
be granted.

Respectfully submitted,

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APPENDIX

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**COURT OF APPEALS DENIAL OF
PETITION FOR REHEARING**

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**OPINION OF COURT OF APPEALS
DATED OCTOBER 15, 1982**

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**OPINION OF COURT OF APPEALS
DATED MAY 12, 1981**

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**MEMORANDUM AND ORDER
OF DISTRICT COURT**

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the twenty-first day of December one thousand nine hundred and eighty-two..

-----x

EDWARD G. HALLEY,

Plaintiff-Appellant-Cross Appellee,

-v-

CONSOLIDATED RAIL CORPORATION,

Defendant-Appellee-Cross Appellant.

-----x

No. 82-7332

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the plaintiff-appellant-cross appellee, Edward G. Halley,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. Daniel Fusaro, Clerk

by: Francis X. Gindhart,
Chief Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 15th day of October, one thousand nine hundred and eighty-two.

Present:

HONORABLE IRVING R. KAUFMAN,
HONORABLE THOMAS J. MESKILL,
HONORABLE THOMAS E. FAIRCHILD,
U.S. Court of Appeals,
Seventh Circuit, sitting
by designation.

-----x

EDWARD G. HALLEY,

Plaintiff-Appellant-
Cross-Appellee,

-v-

CONSOLIDATED RAIL CORPORATION,

Defendant-Appellee-
Cross-Appellant.

-----x

No. 82-7332

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. The district court properly reduced the damage award for lost earnings in the first trial, by taking into account Halley's tax bracket.

Norfolk & Western Railway Co. v.

Liepelt, 444 U.S. 490 (1980). While the parties dispute the substance of their agreement, Judge Knapp's order makes it clear there was a stipulation that Halley was in a 25% tax bracket. It was not improper for the judge to reduce the jury award for lost earnings, rather than requiring the jury to consider testimony concerning Halley's tax bracket and to make the appropriate deductions. Cf. Chiarello v. Domenico Bus Service, 542 F.2d 883, 886-87 (2d Cir. 1976) (court indicates approval for district court's reduction of damage award to account for present value of future injuries).

2. Judge Knapp did not abuse his discretion in reducing the jury award for future pain and suffering from \$25,000 to \$500. While jury verdicts in Federal Employers' Liability Act cases "are particularly resistant to being overturned", Akermanis v. Sea-Land Service, Inc., Nos. 81-7883, 81-7873, slip op. at 4813 (2d Cir. Sept. 14, 1982), the district court does have discretion to order a remittitur where an award is clearly unsupported by the evidence. See Reinerstein v. George W. Rogers Construction Corp., 519 F.2d 531-32 (2d Cir. 1975). The court correctly found that there was no support in the record for the \$25,000 award, and accordingly, the remittitur was proper.

2

3. The \$100,000 award for lost earnings, reduced to \$75,00 by the district court, was within a reasonable range, and was not without support in the record. Accordingly, Judge Knapp properly declined to order a remittitur for this award.

4. The judgment is affirmed.

IRVING R. KAUFMAN,

THOMAS J. MESKILL,

THOMAS E. FAIRCHILD,
Circuit Judges.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twelfth day of May, one thousand nine hundred and eighty-one.

Present:

HONORABLE IRVING R. KAUFMAN,

HONORABLE JAMES L. OAKES,
Circuit Judges,

HONORABLE HENRY F. WERKER,
District Judge,
sitting by designation.

-----x

EDWARD G. HALLEY,

Plaintiff-Appellant-
Cross-Appellee.

v.

CONSOLIDATED RAIL CORPORATION,
Defendant-Appellee-
Cross-Appellant.

-----x

No. 81-7024, 82

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

Appeal from the United States
District Court for the Southern District
of New York.

This cause came on to be heard
on the transcript of record from the
United States District Court for the
Southern District of New York, and was
argued by counsel.

ON CONSIDERATION WHEREOF, it is
now hereby ordered, adjudged, and de-
creed that the appeals are dismissed.

1. The district court's order granting a new trial unless plaintiff accepted the remittitur was not final, and no judgment has been entered. Accordingly, plaintiff's appeal is dismissed. Eaton v. National Steel Products Co., 624 F.2d 863,864 (9th Cir. 1980) (per curiam). See also Howell v. Marmpegaso Compania Naviera, S.A., 566 F.2d 992, 993 (5th Cir. 1978).
2. Judgments entered on jury awards reduced by the trial court and accepted by the plaintiff are not appealable, since plaintiff has agreed to the reduction. Donovan v. Penn Shipping Co., 429 U.S. 648 (1977) (per curiam); Reinertsen v. George W. Rogers Construction Corp., 519 F.2d 531, 533 (2d Cir. 1975); S. Burch & Sons v. Martin, 244 F.2d 556, 562 (9th Cir.), cert. denied, 355 U.S. 837 (1957).

3. Similarly, orders granting a new trial are not appealable immediately, whether accompanied by remittitur or not. Evans v. Calmar Steamship Co., 534 F.2d 519, 522 (2d Cir. 1967). See also Compagnie Nationale Air France v. Port of New York Authority, 427 F.2d 951 (2d Cir. 1970). Rather, plaintiff must pursue the new trial to judgment, and then appeal the district court's decision to set aside the first verdict and grant a new trial. See Reinertsen v. George W. Rogers Construction Corp., supra, 519 F.2d at 533-34.

4. The district court's order conditionally setting aside the jury verdict is not "separable from the merits". Handwerger v. Ginsberg, 519 F.2d 1339 (2d Cir. 1975). Accordingly, it is not reviewable under the doctrine of Cohen v. Beneficial Industrial Loan Corp.,

337 U.S. 541 (1949). See generally
UAW v. National Caucus of Labor Commit-
tees, 525 F.2d 323 (2d Cir. 1975).

5. No final disposition of the award
for future lost income has been made.
The district court's order with respect
to that award is not final and not
appealable. Accordingly, Conrail's
cross-appeal is dismissed. See Catlin
v. United States, 324 U.S. 229 (1945).

IRVING R. KAUFMAN,

JAMES L. OAKES,
Circuit Judges.

HENRY R. WERKER,
District Judge.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

EDWARD G. HALLEY, :

Plaintiff, :

-against- :

CONSOLIDATED RAIL CORPORATION, :

Defendant. :

-----X

MEMORANDUM AND ORDER

79 Civ. 2137

KNAPP, D.J.

Four questions are presented by defendant's post trial motion:

1. Whether or not the award of \$10,000 for loss of earnings for the period from January 5 to April 19, 1979, and of \$100,000 for diminution of earnings from April 19, 1979 should be reduced by the stipulated 25% to make allowance for the non-taxability of said awards. The parties agreed at the charging conference that 25% fairly

represents the taxes plaintiff would have had to pay had he earned the sums awarded him by the jury. We find for the defendant on this question for the reasons discussed at the charging conference.

See Norfolk & Western R. Co. v. Liepelt (1980) 444 U.S. 490.

2. Whether or not the award for lost and/or diminution of future earnings should be set aside or reduced for plaintiff's failure to mitigate damages by seeking appropriate psychiatric assistance. We find for the plaintiff on this question.

"(A)n elemental principle of damages is that the defendant must bear the burden of proving mitigation." G. & R. Corporation v. American Security & Trust Company (D.C. Cir. 1975) 523 F 2d 1164, 1176. "While Plaintiff was under an obligation to mitigate damages, it was Defendant's burden to prove that

Plaintiff failed in this obligation."

Diversified Environments, Inc. v.

Olivetti Corporation of America (M.D.

Pa. 1978) 461 F. Supp. 286, 292. See

also Caiazzo v. Volkswagenwerk, A.G.

(E.D.N.Y. 1979) 468 F. Supp. 593, 598-99;

United States v. Russell Electric Co.

(S.D.N.Y. 1965) 250 F. Supp. 2, 24; T.C.

Bateson Construction Company v. United

States (Ct. Cl. 1963) 319 F.2d 135, 160

("(T)he burden of proof with respect to a plaintiff's asserted failure to mitigate damages rests upon the defendant who

asserts it.") In the instant case, def-

endant failed to offer a scintilla of evidence on this issue, or to contradict

Dr. Eshkenazi's opinion that any

psychiatric treatment of plaintiff would

probably have been futile. We also feel

that the amount of damages awarded with

regard to future earnings constitutes

a jury question not subject to our review.

3. Whether or not the award for pain and suffering endured by plaintiff between January 5 and April 19, 1979 should be reduced. We find for the plaintiff on this question. Although the award was generous in the extreme, we cannot say that it shocks the conscience of the court. As the Court of Appeals for this Circuit has recently observed in a somewhat different context, "(i)t is well established that the role of the jury is significantly greater in Jones Act and FELA cases than in common law negligence actions."

Johannessen v. Gulf Trading & Transportation Co. (2d Cir. 1980) _____ F.2d _____ (Slip opinion, September Term, 1980, at 125, 130).

4. Whether or not the award for pain and suffering endured by plaintiff after April 19, 1979 should be set aside

or reduced. We find substantially for the defendant on this issue. At trial, we charged, over the defendant's objection, that the jury could consider "Humiliation" or other forms of emotional distress. With the exception of the two rides on the fast trains, there is not a scintilla of evidence that plaintiff suffered, is suffering, or is likely in the future to suffer any discomfort so long as he avoids fast freight trains. We believe that the monetary damages for diminution of earnings has adequately compensated him for this deprivation, and that the sum of \$500 would be ample compensation for any emotional distress suffered during and/or after the two rides on the fast freight trains. We will accordingly direct a new trial as to the entire case unless the plaintiff on or before January 16, 1981 submits a judgment on five (5)

days' notice which reflect such remittitur and is otherwise in accordance with this Memorandum and Order.

Let the plaintiff submit an appropriate order on five (5) days' notice.

SO ORDERED.

Dated: New York, New York
December 24, 1980.

WHITMAN KNAPP, U.S.D.J.